

Introduced by Senator Lieu

February 11, 2014

An act to amend ~~Section~~ *Sections 1405 and 1417.9* of, and to add *Section 1405.1* to, the Penal Code, relating to DNA testing.

LEGISLATIVE COUNSEL'S DIGEST

SB 980, as amended, Lieu. Prisoners: DNA testing.

~~Existing law allows a person who was convicted of a felony and is currently serving a term of imprisonment to make a motion for the performance of forensic deoxyribonucleic acid (DNA) testing. Existing~~

(1) Existing law allows an incarcerated person who has been convicted of a felony to make a written motion for the performance of forensic deoxyribonucleic acid (DNA) testing according to a specified procedure.

This bill would, upon appointment or retention of counsel to investigate and file a motion pursuant to these provisions, or at any time after a petition for DNA testing has been filed, authorize a court to order that counsel be provided access to physical evidence for the purpose of examining physical evidence relating to the investigation, arrest, and prosecution of the defendant upon a showing that there is good cause to believe that access to physical evidence is reasonably necessary to the counsel's effort to investigate whether a motion for DNA testing is appropriate, as specified. By increasing the duties of local governments in providing access to physical evidence, this bill would impose a state-mandated local program.

(2) Existing law requires a court to grant the motion for DNA testing if it determines, among other things, that the requested DNA testing

results would raise a reasonable probability that, in light of all the evidence, the convicted person's verdict or sentence would have been more favorable if the results of DNA testing had been available at the time of conviction.

This bill would instead require the court to grant the motion if it determines that the DNA testing results would be relevant to the issue of the identity of the perpetrator, and would require the court to presume the requested testing results would be exculpatory. The bill also would make conforming changes regarding the required contents of a petition requesting DNA testing. The bill would authorize a court to order a database search of the Combined DNA Index System to compare a profile obtained from the results of DNA testing conducted pursuant to these provisions to the profiles contained in the databank. The bill would change the accreditation requirements for a laboratory that may be designated by the court to perform the DNA testing pursuant to these provisions if the parties cannot mutually agree on a laboratory, as specified.

(3) Existing law requires the appropriate governmental entity to retain all biological material that is secured in connection with a criminal case for the period of time that any person remains incarcerated in connection with the case. Existing law allows the governmental entity to dispose of biological material before the expiration of this time period if the governmental entity notifies the inmate and his or her counsel, and the notifying entity does not receive, within 90 days of sending the notification, a motion for DNA testing, a request that the material not be destroyed because a motion for DNA testing will be filed within 180 days, or a declaration of innocence that has been filed with the court within 180 days of the judgment of conviction.

This bill would require the governmental entity to retain all biological material that is secured in connection with a criminal case for the period of time that any person remains incarcerated, on probation, or on parole in connection with the case. The bill would allow the governmental entity to dispose of biological material before the expiration of this time if the governmental entity notifies the inmate and his or her counsel, and the notifying entity does not receive, within one year of sending the notification, a motion for DNA testing, a request that the material not be destroyed because a motion for DNA testing will be filed within one year, or a declaration of innocence that has been filed with the court within one year of the judgment of conviction. By increasing the duties

of local governmental entities in regard to the retention of biological material, this bill would impose a state-mandated local program.

If evidence has been destroyed in violation of these provisions, and if the appropriate governmental entity receives a request for evidence, the bill would require the agency to submit a statement that a representative from the agency personally searched for the requested evidence and determined that the evidence has been destroyed. This bill would require the statement to be signed under penalty of perjury. By expanding the crime of perjury, this bill would impose a state-mandated local program. The bill would require the court to consider appropriate remedies if it finds that biological evidence has been destroyed.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that with regard to certain mandates no reimbursement is required by this act for a specified reason.

With regard to any other mandates, this bill would provide that, if the Commission on State Mandates determines that the bill contains costs so mandated by the state, reimbursement for those costs shall be made pursuant to the statutory provisions noted above.

This bill would make a technical, nonsubstantive change to these provisions.

*Vote: majority. Appropriation: no. Fiscal committee: ~~no~~-yes.
State-mandated local program: ~~no~~-yes.*

The people of the State of California do enact as follows:

- 1 SECTION 1. Section 1405 of the Penal Code is amended to
- 2 read:
- 3 1405. (a) A person who was convicted of a felony and is
- 4 currently serving a term of imprisonment may make a written
- 5 motion before the trial court that entered the judgment of conviction
- 6 in his or her case, for performance of forensic deoxyribonucleic
- 7 acid (DNA) testing.
- 8 (b) (1) An indigent convicted person may request appointment
- 9 of counsel to prepare a motion under this section by sending a
- 10 written request to the court. The request shall include the person's
- 11 statement that he or she was not the perpetrator of the crime and

1 that DNA testing is relevant to his or her assertion of innocence.
2 The request also shall include the person's statement as to whether
3 he or she previously has had counsel appointed under this section.

4 (2) If any of the information required in paragraph (1) is missing
5 from the request, the court shall return the request to the convicted
6 person and advise him or her that the matter cannot be considered
7 without the missing information.

8 (3) (A) Upon a finding that the person is indigent, he or she
9 has included the information required in paragraph (1), and counsel
10 has not previously been appointed pursuant to this subdivision,
11 the court shall appoint counsel to investigate and, if appropriate,
12 to file a motion for DNA testing under this section and to represent
13 the person solely for the purpose of obtaining DNA testing under
14 this section.

15 (B) Upon a finding that the person is indigent, and counsel
16 previously has been appointed pursuant to this subdivision, the
17 court may, in its discretion, appoint counsel to investigate and, if
18 appropriate, to file a motion for DNA testing under this section
19 and to represent the person solely for the purpose of obtaining
20 DNA testing under this section.

21 (4) This section does not provide for a right to the appointment
22 of counsel in a postconviction collateral proceeding, or to set a
23 precedent for any such right, in any context other than the
24 representation being provided an indigent convicted person for the
25 limited purpose of filing and litigating a motion for DNA testing
26 pursuant to this section.

27 *(c) Upon appointment of counsel pursuant to subdivision (b),*
28 *or upon retention of counsel in all other cases, to investigate and,*
29 *if appropriate, to file a motion for DNA testing pursuant to this*
30 *section, and upon request of counsel, or at any time after a petition*
31 *has been filed pursuant to this section, a court may order that*
32 *counsel, or counsel's representatives, be provided access to*
33 *physical evidence for the purpose of examination, including, but*
34 *not limited to, any physical evidence relating to the investigation,*
35 *arrest, and prosecution of the defendant, upon a showing that there*
36 *is good cause to believe that access to physical evidence is*
37 *reasonably necessary to the counsel's effort to investigate whether*
38 *a motion for DNA testing is appropriate. Upon request of counsel,*
39 *and upon a showing that there is good cause to believe that it is*
40 *reasonably necessary to counsel's effort to investigate whether a*

1 *motion for DNA testing is appropriate, the court also may order*
2 *all of the following:*

3 *(1) The appropriate governmental entity to locate and provide*
4 *counsel with any documents, notes, logs, or reports relating to*
5 *items of physical evidence collected in connection with the case*
6 *or to otherwise assist the defendant in locating items of biological*
7 *evidence that the governmental entity contends have been lost or*
8 *destroyed.*

9 *(2) The appropriate governmental entity to take reasonable*
10 *measures to locate biological evidence that may be in its custody.*

11 *(3) The appropriate governmental entity to assist counsel in*
12 *locating relevant evidence that may be in the custody of a public*
13 *or private hospital, public or private laboratory, or other facility.*

14 *(4) The production of laboratory documents of analyses*
15 *performed from the time of evidence intake to disposition, in the*
16 *original form provided by the laboratory, as prepared in*
17 *connection with the examination or analyses of any items collected*
18 *as evidence that may contain biological material. This includes,*
19 *but is not limited to, the underlying data and laboratory notes*
20 *prepared in connection with DNA tests, presumptive tests for the*
21 *presence of biological material, serological tests, and analyses of*
22 *trace evidence, if the evidence had been subjected to that testing.*
23 *Any and all items from the requested case file shall be made*
24 *available, including digital files and nonphotocopied*
25 *photograph-quality prints of photographs taken.*

26 *(e)*

27 *(d) (1) The motion for DNA testing shall be verified by the*
28 *convicted person under penalty of perjury and shall do all of the*
29 *following:*

30 *(A) Explain why the identity of the perpetrator was, or should*
31 *have been, a significant issue in the case.*

32 *(B) Explain, in light of all the evidence, how the requested DNA*
33 *testing would raise a reasonable probability that the convicted*
34 *person's verdict or sentence would be more favorable if the results*
35 *of DNA testing had been available at the time of conviction be*
36 *relevant to the issue of the identity of the perpetrator.*

37 *(C) Make every reasonable attempt to identify both the evidence*
38 *that should be tested and the specific type of DNA testing sought.*

1 (D) Reveal the results of any DNA or other biological testing
2 that was conducted previously by either the prosecution or defense,
3 if known.

4 (E) State whether any motion for testing under this section
5 previously has been filed and the results of that motion, if known.

6 (2) Notice of the motion shall be served on the Attorney General,
7 the district attorney in the county of conviction, and, if known, the
8 governmental agency or laboratory holding the evidence sought
9 to be tested. Responses, if any, shall be filed within 60 days of the
10 date on which the Attorney General and the district attorney are
11 served with the motion, unless a continuance is granted for good
12 cause.

13 ~~(d)~~

14 (e) If the court finds evidence was subjected to DNA or other
15 forensic testing previously by either the prosecution or defense, it
16 shall order the party at whose request the testing was conducted
17 to provide all parties and the court with access to the laboratory
18 reports, underlying data, and laboratory notes prepared in
19 connection with the DNA or other biological evidence testing.

20 ~~(e)~~

21 (f) The court, in its discretion, may order a hearing on the
22 motion. The motion shall be heard by the judge who conducted
23 the trial, or accepted the convicted person's plea of guilty or nolo
24 contendere, unless the presiding judge determines that judge is
25 unavailable. Upon request of either party, the court may order, in
26 the interest of justice, that the convicted person be present at the
27 hearing of the motion.

28 ~~(f) The~~

29 (g) *Before the grant of a motion for DNA testing pursuant to*
30 *this section, the defendant is not required to show that a favorable*
31 *test would conclusively establish his or her innocence. Rather, the*
32 *court shall grant the motion for DNA testing if it determines all*
33 *of the following have been established:*

34 (1) The evidence to be tested is available and in a condition that
35 would permit the DNA testing requested in the motion.

36 (2) The evidence to be tested has been subject to a chain of
37 custody sufficient to establish it has not been substituted, tampered
38 with, replaced, or altered in any material ~~aspect.~~ *aspect, if the chain*
39 *of custody does not establish the integrity of the evidence, the*
40 *testing itself has the potential to establish the integrity of the*

1 *evidence. For purposes of this section, evidence that has been in*
2 *the custody of law enforcement, other government officials, or a*
3 *public or private hospital shall be presumed to satisfy the chain*
4 *of custody requirement of this paragraph, absent specific evidence*
5 *of material tampering, replacement, or alteration.*

6 (3) The identity of the perpetrator of the crime was, or should
7 have been, a significant issue in the case.

8 (4) The convicted person has made a prima facie showing that
9 the evidence sought to be tested is material to the issue of the
10 convicted person's identity as the perpetrator of, or accomplice
11 to, the crime, special circumstance, or enhancement allegation that
12 resulted in the conviction or sentence.

13 ~~(5) The requested DNA testing results would raise a reasonable~~
14 ~~probability that, in light of all the evidence, the convicted person's~~
15 ~~verdict or sentence would have been more favorable if the results~~
16 ~~of DNA testing had been available at the time of conviction. The~~
17 ~~court in its discretion may consider any evidence whether or not~~
18 ~~it was introduced at trial.~~

19 *(5) The requested DNA testing results would be relevant to the*
20 *issue of the identity of the perpetrator. In making this determination*
21 *pursuant to this paragraph, the court shall presume the requested*
22 *testing results will be exculpatory, and shall determine whether*
23 *the requested DNA testing results would be relevant to the issue*
24 *of the identity of the perpetrator. Exculpatory results may be results*
25 *that exclude the convicted person, or results that both exclude the*
26 *convicted person and match another suspect or an offender in the*
27 *Combined DNA Index System (CODIS) as defined in Section*
28 *1405.1, or match an unrelated crime or crimes in CODIS. The*
29 *court in its discretion may consider any evidence whether or not*
30 *it was introduced at trial.*

31 (6) The evidence sought to be tested meets either of the
32 following conditions:

33 (A) The evidence was not tested previously.

34 (B) The evidence was tested previously, but the requested DNA
35 test would provide results that are reasonably more discriminating
36 and probative of the identity of the perpetrator or accomplice or
37 have a reasonable probability of contradicting prior test results.

38 (7) The testing requested employs a method generally accepted
39 within the relevant scientific community.

40 (8) The motion is not made solely for the purpose of delay.

1 ~~(g)~~

2 (h) (1) If the court grants the motion for DNA testing, the court
3 order shall identify the specific evidence to be tested and the DNA
4 technology to be used.

5 (2) The testing shall be conducted by a laboratory mutually
6 agreed upon by the district attorney in a noncapital case, or the
7 Attorney General in a capital case, and the person filing the motion.
8 If the parties cannot agree, the court shall designate the laboratory
9 to conduct the testing and shall consider designating a laboratory
10 accredited by the American Society of Crime Laboratory Directors
11 Laboratory Accreditation Board (ASCLD/LAB) an accreditation
12 body that is a signatory to the International Laboratory
13 Accreditation Cooperation (ILAC) Mutual Recognition Agreement
14 (MRA) and offers forensic laboratory accreditation services.

15 (3) Analysts, technicians, or other agents of the laboratory
16 conducting the testing, including local or state governmental
17 laboratories, shall communicate directly with and provide
18 documentation directly to both parties simultaneously, and shall
19 not communicate with one party individually, unless the parties
20 agree otherwise.

21 ~~(h)~~

22 (i) The result of any testing ordered under this section shall be
23 fully disclosed to the person filing the motion, the district attorney,
24 and the Attorney General. If requested by any party, the court shall
25 order production of the underlying laboratory data and notes.

26 ~~(i)~~

27 (j) (1) ~~The cost of DNA testing ordered under this section shall~~
28 ~~be borne by the state or the applicant, as the court may order in~~
29 ~~the interests of justice, if it is shown that the applicant is not~~
30 ~~indigent and possesses the ability to pay. The costs of DNA testing,~~
31 ~~litigation costs incurred by appointed counsel for the defendant,~~
32 ~~and fees to appointed counsel for his or her representation of the~~
33 ~~defendant, ordered pursuant to this section, shall be borne by the~~
34 ~~state if it is shown that the applicant is indigent and not able to~~
35 ~~pay. These costs shall not be borne by the county where the motion~~
36 ~~is filed and granted. If the applicant is not indigent, and is able to~~
37 ~~pay, the court may order the applicant to bear the costs. However,~~
38 the cost of any additional testing to be conducted by the district
39 attorney or Attorney General shall not be borne by the convicted
40 person.

1 (2) In order to pay the state's share of any testing costs, the
2 laboratory designated in subdivision (g) shall present its bill for
3 services to the superior court for approval and payment. It is the
4 intent of the Legislature to appropriate funds for this purpose in
5 the 2000–01 Budget Act.

6 ~~(j)~~

7 (k) An order granting or denying a motion for DNA testing
8 under this section shall not be appealable, and shall be subject to
9 review only through petition for writ of mandate or prohibition
10 filed by the person seeking DNA testing, the district attorney, or
11 the Attorney General. The petition shall be filed within 20 days
12 after the court's order granting or denying the motion for DNA
13 testing. In a noncapital case, the petition for writ of mandate or
14 prohibition shall be filed in the court of appeal. In a capital case,
15 the petition shall be filed in the California Supreme Court. The
16 court of appeal or California Supreme Court shall expedite its
17 review of a petition for writ of mandate or prohibition filed under
18 this subdivision.

19 ~~(k)~~

20 (l) DNA testing ordered by the court pursuant to this section
21 shall be done as soon as practicable. However, if the court finds
22 that a miscarriage of justice will otherwise occur and that it is
23 necessary in the interests of justice to give priority to the DNA
24 testing, a DNA laboratory shall be required to give priority to the
25 DNA testing ordered pursuant to this section over the laboratory's
26 other pending casework.

27 ~~(l)~~ DNA

28 (m) DNA profile information from biological samples taken
29 from a convicted person pursuant to a motion for postconviction
30 DNA testing is exempt from any law requiring disclosure of
31 information to the public.

32 ~~(m)~~

33 (n) Notwithstanding any other provision of law, the right to file
34 a motion for postconviction DNA testing provided by this section
35 is absolute and shall not be waived. This prohibition applies to,
36 but is not limited to, a waiver that is given as part of an agreement
37 resulting in a plea of guilty or nolo contendere.

38 ~~(n)~~

39 (o) The provisions of this section are severable. If any provision
40 of this section or its application is held invalid, that invalidity shall

1 not affect other provisions or applications that can be given effect
2 without the invalid provision or application.

3 *SEC. 2. Section 1405.1 is added to the Penal Code, to read:*

4 *1405.1. (a) If the court grants a motion for DNA testing*
5 *pursuant to Section 1405, testing is performed, and a DNA profile*
6 *is obtained from the results of DNA testing of biological material*
7 *that excludes the convicted person, the court may, on its own*
8 *motion or by motion of the defendant, order a database search of*
9 *the Combined DNA Index System (CODIS) to compare the profile*
10 *obtained from the results of DNA testing of biological material to*
11 *the profiles contained within the CODIS databank. DNA profiles*
12 *shall meet current national DNA database index system eligibility*
13 *standards and conform to current Federal Bureau of Investigation*
14 *quality assurance standards in order to be eligible for search*
15 *against the state index system.*

16 *(b) For the purposes of this section, profiles contained within*
17 *the CODIS databank includes those profiles contained with the*
18 *Convicted Offender Index, the Forensic Index, the Arrestee Index,*
19 *the Missing or Unidentified Persons Index, and the Missing*
20 *Persons Reference Index.*

21 *SEC. 3. Section 1417.9 of the Penal Code is amended to read:*

22 *1417.9. (a) Notwithstanding any other provision of law and*
23 *subject to subdivision (b), the appropriate governmental entity*
24 *shall retain all biological material that is secured in connection*
25 *with a criminal case for the period of time that any person remains*
26 *incarcerated, on probation, or on parole in connection with that*
27 *case. The governmental entity shall have the discretion to determine*
28 *how the evidence is retained pursuant to this section, provided that*
29 *the evidence is retained in a condition suitable for deoxyribonucleic*
30 *acid (DNA) testing.*

31 *(b) A governmental entity may dispose of biological material*
32 *before the expiration of the period of time described in subdivision*
33 *(a) if all of the conditions set forth below are met:*

34 *(1) The governmental entity notifies all of the following persons*
35 *of the provisions of this section and of the intention of the*
36 *governmental entity to dispose of the material: any person, who*
37 *as a result of a felony conviction in the case is currently serving a*
38 *term of imprisonment and who remains incarcerated, on probation,*
39 *or on parole in connection with the case, any counsel of record,*

1 the public defender in the county of conviction, the district attorney
2 in the county of conviction, and the Attorney General.

3 (2) The notifying entity does not receive, within ~~90 days~~ *one*
4 *year* of sending the notification, any of the following:

5 (A) A motion filed pursuant to Section 1405. However, upon
6 filing of that motion, the governmental entity shall retain the
7 material only until the time that the court's denial of the motion
8 is final.

9 (B) A request under penalty of perjury that the material not be
10 destroyed or disposed of because the declarant will file ~~within 180~~
11 ~~days~~ a motion for DNA testing pursuant to Section 1405 ~~that is~~
12 ~~followed within 180 days by a motion for DNA testing pursuant~~
13 ~~to Section 1405 within one year~~, unless a request for an extension
14 is requested by the convicted person and agreed to by the
15 governmental entity in possession of the evidence.

16 (C) A declaration of innocence under penalty of perjury that
17 has been filed with the court within ~~180 days~~ *one year* of the
18 judgment of conviction or July 1, 2001, whichever is later.
19 However, the court shall permit the destruction of the evidence
20 upon a showing that the declaration is false or there is no issue of
21 identity that would be affected by additional testing. The convicted
22 person may be cross-examined on the declaration at any hearing
23 conducted under this section or on an application by or on behalf
24 of the convicted person filed pursuant to Section 1405.

25 (3) No other provision of law requires that biological evidence
26 be preserved or retained.

27 (c) Notwithstanding any other provision of law, the right to
28 receive notice pursuant to this section is absolute and shall not be
29 waived. This prohibition applies to, but is not limited to, a waiver
30 that is given as part of an agreement resulting in a plea of guilty
31 or nolo contendere.

32 *(d) If evidence has been destroyed in violation of this section*
33 *or otherwise, and if the appropriate governmental entity receives*
34 *a request for evidence under Section 1405, the appropriate*
35 *governmental entity shall submit a statement that a representative*
36 *from the agency personally searched for the requested evidence,*
37 *without relying upon the agency's internal index or evidence*
38 *location database, and determined that the evidence has been*
39 *destroyed. The statement shall be signed under penalty of perjury*
40 *by the agency's representative who conducted the search. If the*

1 *court finds that biological evidence was destroyed in violation of*
2 *the provisions of this section, it shall consider appropriate*
3 *remedies.*

4 *SEC. 4. No reimbursement is required by this act pursuant to*
5 *Section 6 of Article XIII B of the California Constitution for certain*
6 *costs that may be incurred by a local agency or school district*
7 *because, in that regard, this act creates a new crime or infraction,*
8 *eliminates a crime or infraction, or changes the penalty for a crime*
9 *or infraction, within the meaning of Section 17556 of the*
10 *Government Code, or changes the definition of a crime within the*
11 *meaning of Section 6 of Article XIII B of the California*
12 *Constitution.*

13 *However, if the Commission on State Mandates determines that*
14 *this act contains other costs mandated by the state, reimbursement*
15 *to local agencies and school districts for those costs shall be made*
16 *pursuant to Part 7 (commencing with Section 17500) of Division*
17 *4 of Title 2 of the Government Code.*